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IN THE

SUPREME COURT OF THE UNITED STATES

SPRING TERM, 1977

No. 76-941

PAUL H. GIBSON, SHERIFF OF GUILFORD COUNTY,
Petitioner

vs.

VOULYNNE SMALL,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Paul H. Gibson, Sheriff of Guilford County prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled cause on September 26, 1976 (Court of Appeals Opinion, *infra*, p. A-10).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 541 F.2d 277 (4th Cir. 1976) and is included in the Appendix beginning at page A-10. The opinion of the United States District Court for the Middle District of North Carolina is included in the Appendix at page A-1.

JURISDICTION

The judgment of the Court of Appeals was entered on September 26, 1976. An order denying the defendant petitioner's petition for a rehearing, *en banc*, was entered on October 21, 1976. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) (1966).

QUESTIONS PRESENTED

1. Whether, in the absence of any claim that a public employer's termination of an employee was motivated by a desire to curtail or penalize the employee's exercise of constitutionally protected rights, and in the absence of any claim by the employee of a valid expectation of continued employment under applicable state law, the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the employee to be afforded notice and a hearing prior to termination, regardless of the circumstances surrounding and the reasons for the termination?

2. Whether a deputy sheriff who concededly had no property interest in her appointment as a deputy, is deprived of "liberty" under the Due Process Clause of the Fourteenth Amendment to the United States Constitution when her appointment is terminated without notice or hearing for violating a General Order of the Sheriff that off-duty deputies conduct themselves in a manner above reproach and so as not to discredit the law enforcement profession, where the conduct which the Sheriff felt violated the General Order was such that it might damage the deputy's reputation?

3. Whether a deputy sheriff's interest in her reputation constitutes a protected "liberty" interest under the Due Process Clause of the Fourteenth Amendment to the United States Constitution where there are adequate remedies under state law for damage to reputation?

4. What constitutes a publication of the reasons for an employee's termination sufficient to invoke the procedural protections of the Due Process Clause to the Fourteenth Amendment to the United States Constitution?

5. Whether a deputy sheriff, who has been terminated for reasons which might damage her reputation and character and those reasons were published, may recover damages absent proof of actual injury and actual loss?

6. Whether the District Court erred in rendering judgment on a theory not raised by the parties in their pleadings or proof or litigated by the parties by consent, and whether the Court of Appeals erred in making the additional finding of fact necessary to support the District Court's judgment and then affirming the judgment?

CONSTITUTIONAL PROVISIONS, STATUES AND RULES INVOLVED

1. The relevant portion of the Fourteenth Amendment to the United States Constitution provides:

> "Nor shall any State deprive any person of life, liberty or property, without due process of law."

2. 42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3. The relevant portion of N.C. Gen. Stat. § 153A-103(1) (1974) provides:

> "Each Sheriff and Register of Deeds elected by the people has the exclusive right to hire, discharge, and supervise the employees in his office."

4. The relevant portion of General Order No. 71-2 of the Guilford County Sheriff's Department provides:

> "No member of the Sheriff's Department on duty or not shall act in any manner to bring reproach upon the Department, or Guilford County. Each deputy is to live a quiet, civil, and orderly life, standing as an example to

all citizens. He shall not disturb the peace, become engaged in a brawl, fight, or assault, whereby discredit is caused the Law Enforcement Profession . . Disciplinary action shall be effected immediately by any commanding officer of the Department."

STATEMENT OF THE CASE

The plaintiff-respondent Voulynne Small, a black female former trainee deputy sheriff of Guilford County, North Carolina, filed an action in the United States District Court for the Middle District of North Carolina, Greensboro Division, wherein she alleged that she had been employed as a deputy sheriff of Guilford County on January 8, 1973, and had then been summarily dismissed on February 9, 1973, and further alleged that her dismissal by the defendant-petitioner Paul H. Gibson, Sheriff of Guilford County, was because of her race and color, in violation of 42 U.S.C. § 2000E-2(a)(1). The defendant-petitioner, in his answer, denied that the respondent's dismissal was in any way racially motivated but, to the contrary, alleged that the termination resulted from the respondent's violation of the Code of Conduct: the performance standards expected of deputy sheriffs of Guilford County. The petitioner further alleged in his answer that the dismissal of the respondent was the result of her drinking alcoholic beverages to the point of intoxication and being in a motel with one or more married men who were police officers attending the same training school as the respondent, which conduct was reported to the petitioner by another black deputy.

At the trial of the case the respondent presented evidence in support of the allegations that her dismissal was based on race. The respondent also testified concerning the reasons which the petitioner had given to her, in his private office, for her dismissal. Before she rested her case, however, the respondent offered no evidence that the petitioner publicized, either before or at the time of her dismissal, any statements concerning, or reasons for, the dismissal which would have tended to tarnish her reputation or damage her standing in the community. The respondent's only evidence concerning any publication was that the petitioner told her the reasons for her dismissal in his private office, and that at some time after the termination, petitioner told respondent's father the reasons for respondent's termination.

The petitioner, in turn, put on evidence to show that the respondent's dismissal was totally unrelated to race but rather resulted from conduct on her part which had been reported to him and which he felt violated General Order No. 72-2.

At the conclusion of the trial, even though the District Judge made no finding that there had ever been any publication, either before or after her firing, of the reasons for the respondent's dismissal, and even though there was no evidence or finding that her reputation had suffered any damage or that she had incurred any loss, and even though he found that the respondent's dismissal was totally unrelated to race, the District Court entered judgment for the respondent. In the District Court's Findings of Fact, Conclusions of Law and Opinion, the Court found that:

> "Plaintiff's allegation of racial discrimination in her discharge is not supported by the evidence. It is undisputed the plaintiff was discharged for allegations of intoxication and immoral conduct, which are racially neutral standards in themselves." (Conclusion of Law No. 4) (p. A-6)

Then, even though the issue was not raised in the pleadings or addressed at trial by arguments or evidence presented to the Court, the District Court ruled that:

> "1. Since the plaintiff was discharged for alleged intoxication and immoral conduct, her termination was based on reasons which would tend to damage her standing and associations in her community by tarnishing her reputation and good name. Termination for these reasons would also impose on plaintiff a stigma or employment record that would foreclose her freedom to take advantage of other employment opportunities. Therefore the plaintiff was entitled to notice of the reasons for discharge and the opportunity for a hearing to refute the charges." (p. A-5).

The District Court then awarded the plaintiff back pay.

The petitioner then appealed to the United States Court of Appeals for the Fourth Circuit. In his appeal, the petitioner contended that as a matter of law the respondent had no expectation

of continued employment and was not entitled to notice and a hearing prior to dismissal. The petitioner further argued that even if the reasons for the respondent's dismissal would tend to tarnish her reputation, that the District Court did not find as a fact that those reasons had been published and that therefore its decision could not stand on that basis. The petitioner further contended that it was error for the District Court to decide the case on a theory not presented by the pleadings, evidence or argument of counsel. The Court of Appeals, in a *per curiam* opinion, *found as a fact* that the petitioner had published the reasons for the respondent's dismissal and therefore affirmed the decision of the District Court, basing its decision on *Bishop v. Wood*, ____ U.S. ____, 48 L.Ed.2d 684 (1976), which was decided after this case was argued in the Court of Appeals. The petitioner then timely petitioned the Court of Appeals for the Fourth Circuit for a rehearing, *en banc*, of the appeal, which petition was denied in an order entered October 21, 1976.

REASONS FOR GRANTING THE WRIT

I.

THE RESPONDENT WAS NOT ENTITLED TO NOTICE AND A HEARING PRIOR TO HER TERMINATION FROM THE POSITION OF DEPUTY SHERIFF OF GUILFORD COUNTY BECAUSE SHE CONCEDEDLY HAD NO "PROPERTY" INTEREST IN HER POSITION AND BECAUSE THE WORD "LIBERTY" IN THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT ENCOMPASS THE PROTECTION OF REPUTATIONAL INTERESTS OF A PUBLIC EMPLOYEE.

In his argument in the Court of Appeals and in his brief submitted thereto, counsel for the respondent conceded that the respondent had no expectation of continued employment with the Sheriff's Department of Guilford County. North Carolina General Statute 153A-103(1) clearly gives a Sheriff the unfettered discretion "to hire, discharge, and supervise" those persons he has appointed to be his deputies. The North Carolina Supreme Court, in *Still v. Lance*, 275 N.C. 254, 182 S.E.2d 403 (1971), held that an

expectation of continued employment in North Carolina can exist only if the employer, by statute or contract, has actually granted some form of guarantee. No such guarantee was present in this case. In fact, the evidence clearly showed that a newly appointed deputy in Guilford County was not even considered to be a permanent deputy until he or she had been with the Department for six months. The respondent here had only been with the Department for one month at the time of the termination of her appointment. Therefore, under the reasoning of *Bishop v. Wood*, ____ U.S. ____, 48 L.Ed.2d 684 (1976), the respondent had no expectation of continuing employment and no "property interest" in her position as a deputy sheriff of Guilford County. That being the case, the respondent was entitled to notice and a hearing *only* if the revocation of her appointment invaded a "liberty" interest protected by the Due Process Clause of the Fourteenth Amendment.

In *Paul v. Davis*, ____ U.S. ____, 47 L.Ed.2d 405 (1976), a photograph of Davis, bearing his name, was included in a flyer of "active shoplifters" which was distributed by police chiefs to area merchants in Louisville, Kentucky. Prior to the preparation of the flyer, Davis had been arrested on a charge of shoplifting. However, at the time that the flyer was published and distributed, Davis had not been tried on, or convicted of the charge. Shortly after the distribution of the flyer, the shoplifting charge against Davis was finally dismissed. Davis, alleging that the flyer would inhibit him from entering business establishments for fear of being suspected of shoplifting and would seriously impair his future employment opportunities, filed suit under 42 U.S.C. § 1983 claiming that he had been deprived of "liberty" without due process of law in violation of the Fourteenth Amendment. This Court, in holding that the trial court properly dismissed Davis' complaint, stated that:

> "Respondent in this case cannot assert denial of any right vouchsafed to him by the State and thereby protected under the Fourteenth Amendment. That being the case, petitioner's defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any 'liberty' or 'property' interest protected by the Due Process Clause." *Paul v. Davis, supra*, at 420 (L.Ed.2d)

The present case presents a situation where the respondent's interest in her employment, taken alone, did not constitute a "property" interest under the Due Process Clause, and her interest in her good name and reputation, standing alone, did not constitute a "liberty" interest under the Due Process Clause. The petitioner could have terminated the respondent's employment without stating any reason for the termination and she would not have been entitled to notice and a hearing. Further, the petitioner *could have defamed* the respondent in a situation where the loss of employment was not involved without affording her notice and an opportunity to be heard. The question presented is, therefore, whether or not she has been deprived of "liberty" or "property," as those words are used in the Due Process Clause, when the alleged defamation consisted of the reasons for her termination. Although arguably *Board of Regents v. Roth*, 408 U.S. 564 (1972), *Perry v. Sinderman*, 408 U.S. 593 (1972) and *Bishop v. Wood*, ____ U.S. ____, 48 L.Ed.2d 684 (1976) stand for the proposition that discharging a government employee who has no expectation of continued employment for reasons which would tarnish his reputation invades his "liberty" interest, when the reason for the termination is published and when the termination is accomplished without notice and the opportunity to be heard, the language so stating in all of those cases is *dicta* since none of those cases presented a situation where the reasons for the termination were arguably defamatory and had been published. The central issue in each of those cases was whether the public employee had any expectation of continued employment. This case squarely presents the case where the lower courts have found that the reasons for the respondent's dismissal were defamatory and that those reasons were published. It is submitted that in light of the Court's decision in *Paul v. Davis, supra*, the principles stated in *Roth, Sinderman*, and to some extent, in *Bishop v. Wood*, with respect to reputational interest, should be reconsidered and clarified.

The damage claimed by the respondent in the present case does not differ in kind or quality from the damage claimed by the plaintiff in the *Paul* case. In this case and in the *Paul* case, the sole legally cognizable injury was injury to reputation. In *Goss v. Lopez*, 419 U.S. 565 (1975), while the Court noted that suspension of a student from school based on charges of misconduct could cause damage to the reputation of the student, the court found that all children in the

State of Ohio had the right, under Ohio law, to attend school. In *Marcy v. Brewer*, 408 U.S. 471 (1972), the parolees were granted the right by the state to remain at liberty as long as the terms of their parole were not violated. In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the Court was faced with a situation where the individual's right to purchase and consume alcohol was terminated concurrent with the alleged damage to her reputation. In each of those cases, the plaintiff's reputational damage occurred in conjunction with the deprivation of some right guaranteed under state law. In the present case, however, the respondent has been deprived of no legal right granted by state or federal law. She had no legal claim on a job as a deputy sheriff in Guilford County and no "property" interest in the job. She was subject to termination at any time for any reason and had no claim to any expectancy of continued employment. It is submitted that she is in precisely the same position as was the plaintiff in the *Paul* case. By virture of allegedly defamatory statements made by a public official, she claims that her reputation has been injured. It is submitted that it would be inconsistent and anomalous to hold that the respondent in this case has a claim for relief for infringement of a constitutionally protected "liberty" interest and that the plaintiff in the *Paul* case did not. The only fact distinguishing this case from the *Paul* case is that here the respondent's appointment to a job in which she had no protected "property" interest was revoked. It is respectfully submitted that the Due Process Clause of the Fourteenth Amendment to the United States Constitution does not, within the ambit of "liberty" or "property," protect reputational interests. The respondent in this case has been denied no right guaranteed to her by the State or by federal law which would therefore be protected under the Fourteenth Amendment.

Further, it was stated in *Bishop v. Wood* that:

> "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was

> motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions." *Bishop v. Wood, supra,* at 693 (L.Ed.2d)

If the method and manner in which the respondent was terminated was ill-advised and improper, even then it is neither necessary nor proper for the Federal Courts to provide a forum and remedy for any alleged damage suffered by the respondent. Adequate remedies are already provided in the state courts for any damage which the respondent may have suffered to her reputation or standing in the community. This case presents no more and no less than an action for defamation of character which could have been filed in the state courts.

For all of the above reasons, it is submitted that, first of all, this is a case of first impression which should be decided by this Court, and secondly, if the language in *Roth, Sinderman,* and *Bishop v. Wood* represents the state of the law with respect to "liberty" interests, then such holdings are in conflict with the principles stated in *Paul v. Davis* and merit reconsideration and clarification by this Court.

II.

> EVEN IF THE RESPONDENT WAS ENTITLED TO NOTICE AND A HEARING PRIOR TO HER TERMINATION IF THE REASONS FOR HER TERMINATION HAD BEEN PUBLISHED, THERE WAS NO PUBLICATION OF THE REASONS FOR THE PLAINTIFF'S DISMISSAL SUFFICIENT TO CONSTITUTE A DEPRIVATION OF RESPONDENT'S "LIBERTY" UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Even if the state of the law is such that a public employee who has no property interest in her employment is entitled to notice and a

hearing when the reasons for her dismissal are such as would damage her reputation and they are "published," this Court has not decided what constitutes a "publication" sufficient to invoke the procedural protections of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Other than the evidence that, at some time after respondent's dismissal, the petitioner, at respondent's father's request, told respondent's father the reasons for her dismissal, the only evidence concerning publication in this case was the following question and answer:

> QUESTION (by plaintiff's counsel): "And you have told, have you not, under oath in the pleadings here and to me and to anyone who has come to you and inquired about why Miss Small was let go, you have told she was let go on account of drinking and on account of being in a motel room with men?"
>
> ANSWER (by Paul H. Gibson, Sheriff of Guilford County): "Drinking and in the company of two married men and being in the car."

In the first place, it is not evident from that question and answer that any one other than the respondent's father was ever told the reasons for the revocation of the respondent's appointment. The only publications affirmatively shown by that question and answer were such publications as occurred during the pendency of this lawsuit. In any event, however, it is clear that there was no *public* pronouncement of the reasons for the respondent's dismissal either at the time of her discharge or at any time thereafter. There was no evidence that the petitioner's statements were ever printed in the newspapers. There was no evidence that the reasons for the respondent's dismissal were general knowledge in the community. There was no evidence of communication of the reasons for the respondent's dismissal to any prospective employer of the respondent. The most that the respondent's evidence tended to show was that she was dismissed at one point in time and then at some later point in time one or more persons may have been told the reasons for her discharge. There was no "public posting" concerning the respondent or anything of that sort. There was no evidence

whatsoever that the respondent's character or reputation was injured or damaged in any respect. Therefore, it is submitted that, as a matter of law, there was no "publication" of the reasons for the respondent's dismissal sufficient to invade any "liberty" interest protected by the Due Process Clause of the Fourteenth Amendment.

In *Bishop v. Wood, supra,* the dismissed employee alleged that the reasons for his dismissal were communicated orally to him and also were stated in writing in answer to interrogatories during the course of the litigation. In holding that there had been no publication of the reasons for his dismissal sufficient to invoke the procedural protections of the Due Process Clause, this Court stated that:

> "Since the former communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honesty, or integrity' was thereby impaired. And since the latter communication was made in the course of a judicial proceeding *which did not commence until after petitioner had suffered the injury for which he seeks redress, it surely cannot provide retroactive support for his claim.*" (Emphasis supplied) *Bishop v. Wood, supra,* at 692 (L.Ed.2d)

It is submitted that the clear import of the above emphasized language is that before a publication of the reasons for an employee's dismissal can invade the employee's protected "liberty" interest, the publication must be concurrent with, and in the course of the termination. If such is not the case, then the right to notice and a hearing before dismissal could arise retroactively long after the dismissal has taken place. If the evidence presented in this case showed any publication, then such publication occurred at some point in time after the respondent's dismissal and not concurrent with and in the course of the dismissal. It is submitted that, as a matter of law, any such publication was insufficient to invoke the procedural protections of the Due Process Clause. It is submitted that if the right to notice and a hearing is to arise, it must arise at the time of the dismissal and not arise retroactively at some later point in time. The respondent in this case is in no different situation than was the plaintiff in the *Paul* case. She was allegedly

defamed by an elected official, which defamation was not concurrent with any change in the respondent's legal status, and therefore, invaded no "liberty" interest.

Even if, when a public employee who has no expectation of continued employment is discharged for reasons which could be defamatory and the reasons are made public, he must be given notice and a hearing, it is submitted that the publication of the defamatory reasons must be proximate and concurrent with and in the course of the discharge. Although *Bishop v. Wood, supra,* and *Paul v. Davis, supra,* imply that this is the law, this Court has never directly addressed this issue and it is submitted that the Court should grant *certiorari* in order to consider and clarify this point.

III.

THE RESPONDENT WAS ERRONEOUSLY AWARDED SUBSTANTIAL DAMAGES WITHOUT ANY PROOF OF ACTUAL INJURY OR ACTUAL LOSS.

When a governmental employee having a "property" interest in his job is improperly terminated, *i.e.*, without notice and a hearing, there is no difficulty in ascertaining his damages. Obviously, the employee should be entitled to back pay because he has been wrongfully deprived of his job. The situation is different, however, where the employee has no "property" interest in the job, but is allegedly entitled to damages because his "liberty" interest has been invaded. In such a case, the injury is not the loss of the job. The employee had no legal claim of entitlement to the job. The injury, rather, stems from the publication of the reasons for the dismissal where the reasons would damage his reputation and he has had no opportunity to refute them. In such a case, he has not been wrongfully deprived of his job but instead his character and reputation have been wrongfully damaged. In this situation, back pay is not the proper measure of damages. It is submitted that no damages may be awarded in cases such as this unless the plaintiff proves actual injury to his reputation and actual loss.

In this case, it is undisputed that the petitioner could have fired the respondent without giving a reason and would have incurred no legal liability, *Bishop v. Wood, supra,* regardless of how much

difficulty the respondent had finding other employment. That being the case, it is submitted that the respondent should not be allowed recovery where the reasons for her dismissal were communicated to one or more persons unless she can show that her reputation has actually suffered damage and job opportunities were actually foreclosed.

The situation presented here is not dissimilar to that presented in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), in which it was held that, in a defamation action under state law, it was not proper to permit recovery of presumed damages absent a showing of actual injury, or at least knowledge of falsity or reckless disregard for the truth by the person uttering the defamation. If that is the law with regard to state law defamation actions, it is not at all clear why a party in a federal defamation action should be allowed a recovery upon a lesser showing. The respondent here did not put on one iota of evidence that her reputation had actually been damaged. She did not put on one iota of evidence to show that the fact that she submitted many job applications and received few job offers resulted from the publication of the reasons for her discharge. She did not even show that any organization to which she applied for a job even knew of the reasons for her discharge as a deputy sheriff. Further, neither the District Court nor the Court of Appeals found such facts. In fact, the evidence showed affirmatively that the respondent ultimately obtained a much better job at a substantially increased pay than she had had with the Sheriff's Department of Guilford County. (During the course of the trial the judge stated: "A note of humor, if I might — it looks like the other side might have counterclaimed for betterment. Miss Small has a job now where she doesn't have to go the rigors of what enforcement people have to do at a much greater salary, and you often wonder about your life — things that look like they're disastrous often are stepping stones.")

Based on this, it is submitted that the damage award to the respondent was improper and cannot stand. Logic and justice require that before a plaintiff be awarded damages, he be required to show that he has suffered some damage from the wrong complained of, especially in a case where the award is to be paid by the taxpayers of the county. It is submitted that this Court has not addressed itself to the question of the proper measure of damages to be applied in "liberty" interest cases and that the Court should grant *certiorari* in this case in order to consider this issue.

IV.

THE TRIAL COURT IMPROPERLY RENDERED A JUDGMENT IN THIS CASE ON A THEORY NOT RAISED BY THE PARTIES IN THEIR PLEADINGS OR PROOF OR LITIGATED BY THE PARTIES BY CONSENT, AND THE COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENT AFTER MAKING AN ADDITIONAL FINDING OF FACT NOT FOUND BY THE DISTRICT COURT.

One thing is abundantly clear in this case. The trial court decided the case on a wholly different theory from that which was raised by the pleadings and evidence and argued at the trial. The respondent's complaint plainly stated a cause of action based on racial discrimination. The trial briefs of the parties were directed to the point of racial discrimination. All of the evidence at the trial was directed to the point of whether the respondent was discharged because she was black. The arguments of counsel at trial were directed to the point or racial discrimination. After all of this, however, the Court decided the case for the respondent on the legal theory that the respondent's due process rights to notice and a hearing were abridged. This point was never raised by the parties.

In the leading case of *Sylvan Beach, Inc. v. Koch*, 140 F.2d 852 (8th Cir. 1944) the Court stated that:

> "A Court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. Unless all parties in interest are in court and have voluntarily litigated some issue not within the pleadings, the Court can consider only the issues made by the pleadings, and the judgment may not extend beyond such issues nor beyond the scope of relief sought . . .
>
> The foregoing rules are fundamental and state nothing more than the essentials of due process and fair play. They assure to every person his day in court before judgment is pronounced against him." *Sylvan Beach, Inc. v. Koch, supra*, at 861.

It is submitted that the petitioner was not given his day in court in this case on the question of whether the requirements of notice and a hearing under the Due Process Clause of the Fourteenth Amendment to the United States Constitution had any application to the respondent.

In its opinion the District Court stated that:

> "The contentions in the pleadings, testimony at trial and the arguments in the trial briefs and proposed findings focused primarily on the issue of whether plaintiff was discharged because of her race. However, the complaint, the evidence at trial and, to a certain extent, the briefs of the parties raised and discussed the issue of whether plaintiff was entitled to and did receive adequate notice and an opportunity for a hearing before she was discharged. While it would have been preferable to have the due process issue of notice and hearing more fully litigated and while this court does not wish to stray too far from the procedural adage of 'ain't no allegata without probata and no probata without allegata' by ruling on issues not raised by the parties themselves, there is sufficient evidence to warrant findings of fact and conclusions of law to be made on both the race and the due process issue." (p. A)

As shown above, the District Court recognized that the theory upon which it decided the case was not raised by the parties. The petitioner was not prepared to litigate and did not litigate the question of whether or not the respondent was entitled to notice and a hearing under the Due Process Clause of the Fourteenth Amendment. The petitioner had no notice that any such issue was to be litigated. He was given no opportunity to prepare for and defend against any such issue. Had the petitioner been on notice that the issue was to be litigated, the presentation of his evidence, the cross-examination of the respondent's witnesses, and the legal authorities brought to bear on the case would have been entirely different. It is submitted that it is fundamentally unfair to the petitioner to have litigated a case based on racial discrimination, conclusively show that no such discrimination existed, and then have a judgment entered against him based on a wholly different

legal theory. It is submitted that the judgment of the District Court, for this reason, is erroneous, improper and cannot be sustained.

On appeal to the United States Court of Appeals for the Fourth Circuit, the petitioner raised this question. However, not only did the Court of Appeals not address the question in its *per curiam* opinion, it proceeded to make a new and additional finding of fact that the petitioner had published the reasons for the respondent's discharge and then, based on that, affirmed the District Court's ruling. It is submitted that in so doing the Court of Appeals clearly exceeded its authority. It is not the place of an Appellate Court to sit as the finder of fact in a case. *United States v. Jacques*, 463 F2d 653 (1st. Cir., 1972); *cf.* Rule 52 of the Federal Rules of Civil Procedure. If the facts found by the Trial Court are not sufficient to support the judgment, then the judgment may not stand. This is precisely the situation presented by this case. As a matter of law, the respondent had no property interest in her position as a deputy sheriff which would require notice and a hearing before her dismissal. Therefore, even if the *dicta* statements in *Roth, Sinderman* and *Bishop v. Wood*, concerning damage to reputation represent the state of the law, the respondent would only be entitled to notice and a hearing if the reasons for her dismissal were such as would damage her reputation and those reasons were made public at the time of her dismissal. Here the District Court made no finding that the reasons for the respondent's dismissal were published. Therefore, in order to sustain the District Court's ruling the Court of Appeals itself found as a fact that there had been a publication. It is submitted that this is erroneous and improper as a matter of law and that, therefore, this Court, exercising its supervisory authority over the Courts of the United States, should grant *certiorari* in this case in order to correct the Court of Appeals' erroneous application of its power.

CONCLUSION

It is submitted that the recent cases of *Paul v. Davis, supra* and *Bishop v. Wood, supra*, place in doubt the circumstances under which, if at all, a public employee is entitled to notice and a hearing prior to dismissal when he is dismissed for reasons which would damage his reputation, and those reasons are published. This question requires and deserves consideration by this Court and it is, therefore, important that this Court grant a writ of *certiorari* to consider the question.

Further, it is submitted that this Court has not yet considered the questions with respect to publication and damages which are presented herein and that those questions are of sufficient significance to require a decision by this Court.

For these and other reasons stated, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

VOULYNNE SMALL,	)
Plaintiff	)
	)
v.	)NO. C-412-G-73
	)
PAUL H. GIBSON, Sheriff	)
of Guilford County,	)
Defendant	)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION

GORDON, Chief Judge

In this case, the plaintiff challenges under 42 U.S.C. § 1983 and 42 U.S.C. § 2000e-2(a)(1) her discharge from employment as female juvenile detective with the Guilford County, North Carolina, Sheriff's Department. The plaintiff seeks to recover back pay from the date of her discharge and attorney's fees.[1] Before commencing a discussion of the facts in this case, a few comments concerning the procedural development of this case and the focus of this opinion are in order. The contentions in the pleadings, testimony at trial and the arguments in the trial briefs and proposed findings focused primarily on the issue of whether plaintiff was discharged because of her race. However, the complaint, the evidence at trial and, to a certain extent, the briefs of the parties raised and discussed the issue of whether plaintiff was entitled to and did receive adequate notice and an opportunity for a hearing before she was discharged. While it would have been preferable to have the due process issue of notice and hearing more fully litigated and while the Court does not wish to stray too far from the procedural adage of "ain't no allegata without probata and no probata without allegata" by ruling on issues not raised by the parties themselves, there is sufficient evidence to warrant findings of fact and conclusions of law to be made on both

[1]The plaintiff originally sought reinstatement to her position as female juvenile officer but no longer seeks this relief because she has found preferable and satisfactory employment elsewhere.

the race and the due process issue. *See Jurinko v. Edwin L. Weigand Co.*, 477 F.2d 1038, 1045 (3rd. Cir. 1973). In fact, any other course of action would be an abrogation of the Court's judicial duty in light of the evidence in this case.

FINDINGS OF FACT

1. Defendant hired plaintiff for the position of female juvenile detective at a salary of $573.00 per month on January 8, 1973.

2. At the time of hiring plaintiff was provided with a copy of an employee's manual, which was in force during the time of her employment. This manual contained General Order No. 71-2, which provides among other things:

> "No member of the Sheriff's Department, on duty or not shall act in any manner to bring reproach upon the Department, or Guilford County. Each deputy is to live a quiet, civil, and orderly life, standing as an example to all citizens. He shall not disturb the peace, become engaged in a brawl, fight, or assault, whereby discredit is caused the Law Enforcement Profession . . . Any deputy or member of the Department while on duty or in uniform shall not consume any whiskey, wine, beer, or other intoxicants except in the line of duty. He will not report for duty having the odor or evidence of having recently consumed any intoxicating substance. Disciplinary action shall be effected immediately by any commanding officer of the Department."

Defendant interprets and applies the provisions of General Order No. 71-2 to the effect that social drinking or moderate consumption of alcoholic beverages, not during duty hours, is permissible.

3. Plaintiff was assigned to defendant's department in a training status. She did not have any arrests, investigation, or other substantial law enforcement duties to perform during her period of employment.

4. On February 5, 1973, plaintiff, as a part of her duties as a deputy sheriff, entered a two week school on narcotics and drugs at Guilford Technical Institute. While attending this school, plaintiff

became acquainted with Purvis Rogers and Joseph Buck, members of the New Bern, North Carolina, Police Department, who were also students in the course.

5. On February 6, 1973, plaintiff had lunch with Messrs. Rogers and Buck.

6. By prearrangement on February 7, 1973, at about 10:00 P.M., plaintiff and Guilford County Sheriff's Deputy Harry Knight went to the room of Messrs. Rogers and Buck at Holiday Inn Four Seasons. The four of them remained in the motel room until about 12:30 A. M. During this time Messrs. Rogers and Buck consumed moderate amounts of alcohol. While the plaintiff denies that she had anything to drink, Mr. Knight testified that during the course of the evening plaintiff drank to the point of being under the influence. The door of the motel room was left open during at least a portion of the time of the visit. On this occasion, the four officers discussed law enforcement matters, carried on casual conversation, and watched television. Plaintiff and Mr. Knight drove back together to Mr. Knight's car, and then plaintiff drove home.

7. On February 8, 1973, plaintiff again met Messrs. Rogers and Buck at their motel room. She went to a friend's house and to dinner with Mr. Rogers, and returned with him to the motel room at about 7:30 or 8:00 P. M. They were expecting Mr. Knight to join them again. However, he called at about 9:00 P. M. to say that he was tied up in an investigation and would not be able to meet them. On this occasion Messrs. Rogers and Buck again consumed alcoholic beverages, but plaintiff contends she did not. Again the evidence is that the door to the motel room was left open.

8. Both Messrs. Rogers and Buck are married men. Plaintiff was and is single.

9. On February 8 and 9, 1973, Deputy Sheriff Harry Knight reported to his supervisors and to defendant that he had accompanied plaintiff to the motel room occupied by the officers from New Bern on the first night and had by telephone ascertained plaintiff's presence in the room on the second night. Mr. Knight stated to his supervisor and to defendant that plaintiff consumed alcoholic beverages on these occasions and in his opinion had become intoxicated, and that when Mr. Buck was away from the

room Mr. Rogers attempted to talk Mr. Knight into leaving him alone with plaintiff. After seeing an automobile that resembled plaintiff's in the Holiday Inn parking lot between 2:00 and 3:00 A.M., on February 9, but without ascertaining the identification or registration of this vehicle, Mr. Knight expressed his opinion to his supervisors and to defendant that this was plaintiff's vehicle.

10. During the time of her employment with defendant, plaintiff was regularly dating Jerry Brown. Mr. Brown was married, but had been separated from his wife for several months. Deputy Sheriff Knight also reported to defendant that plaintiff was regularly going out with a married man who was living with his wife.

11. Defendant believed the report received from Deputy Sheriff Knight. He instructed his administrative assistant, Cecil Webster, on February 9, 1973, to discharge the plaintiff.

12. Mr. Webster called the plaintiff into his office on February 9 and discussed with her the situation at the motel with the policemen from New Bern, reports she was dating a married man and reports of her intoxication. Mr. Webster informed her that her employment was terminated.

13. The plaintiff then saw Sheriff Gibson who confronted her with Deputy Knight's reports about her drinking and dating married men and informed her that her employment was terminated. Sheriff Gibson's reasons for discharging plaintiff was that she had become intoxicated and that she engaged in immoral conduct with married men.

14. During the five years preceding March 29, 1974, four Sheriff's Deputies, all white, were discharged by defendant for violating General Order No. 71-2 with respect to the use of intoxicants. One of the individuals was arrested for public drunkenness and disorderly conduct, and another was arrested for driving under the influence of alcohol. Two of the individuals were observed to be under the influence of alcohol while on the job, with this condition adversely affecting their work. During the same period four Sheriff's Deputies were discharged by defendant for sexual immorality in violation of the same General Order. All four of these persons either had lived with or spent the night with persons of the opposite sex to whom they were not married. All of the deputies discharged on these grounds were white.

15. In April, 1973, a black person was hired as a replacement for plaintiff by Sheriff Gibson from a group of white and black applicants.

16. Deputy Knight, whose investigation and report formed the basis for plaintiff's discharge, is black.

17. Following her discharge, plaintiff commenced making diligent and good faith efforts to secure new employment. In May, 1974, she was hired as a counselor in a technical institute at a salary substantially higher than the salary she received while in defendant's employ. Prior to obtaining this position, plaintiff worked on and completed her master's degree, and maintained two jobs. She was employed by A & T State University as a research assistant from September, 1973, to May, 1974, at the rate of $277.00 per month; and she was employed by Sears, Roebuck & Company, where she earned an average of $225.00 per month from September through December, 1973. In addition plaintiff drew unemployment compensation for a period of six weeks totaling $250.00. Plaintiff attended summer school at North Carolina A & T State University during the summer of 1973 carrying two courses.

18. Plaintiff filed a charge of discrimination against defendant with the Equal Employment Opportunity Commission by letter dated April 10, 1973. By two subsequent letters, her attorney made inquiry of the Charlotte District Office of the Equal Employment Opportunity Commission as to the status of her claim. No acknowledgement of the charge of discrimination or of the letters of inquiry, and no other communications of any kind were received by plaintiff or her attorney from the Equal Employment Opportunity Commission prior to the date on which this action was commenced.

CONCLUSIONS OF LAW

1. Since the plaintiff was discharged for alleged intoxication and immoral conduct, her termination was based on reasons which would tend to damage her standing and associations in her community by tarnishing her reputation and good name. Termination for these reasons would also impose on plaintiff a stigma or employment record that would foreclose her freedom to take advantage of other employment opportunities. Therefore, the plaintiff was entitled to notice of the reasons for discharge and the opportunity for a hearing to refute the charges. *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972).

2. The undisputed series of events leading up to plaintiff's discharge (Findings of Fact Nos. 6, 10, 11, 12, 13) demonstrate that plaintiff was given neither adequate notice nor an opportunity for a hearing. This failure constitutes a violation of due process and 42 U.S.C. § 1983 entitling plaintiff to an award of back pay. *Horton v. Orange County Bd. of Educ.*, 464 F.2d 536, 538 (4th Cir. 1972).

3. Plaintiff exhausted all of her administrative remedies under 42 U.S.C. § 2000e-5(f)(1).

4. Plaintiff's allegation of racial discrimination in her discharge is not supported by the evidence. It is undisputed that plaintiff was discharged for allegations of intoxication and immoral conduct, which are racially neutral standards in themselves. Furthermore, the evidence that white employees had been discharged under this same provision (General Order No. 71-2) for conduct more reproachable or deplorable than plaintiff's conduct, as reported by Deputy Knight, does not alone establish that defendant employed a more arbitrary or rigorous application of the General Order to black employees than white. On the contrary, this evidence manifests the use of General Order 71-2 primarily against white employees and not as an instrument which either intentionally discriminates or has the effect of discriminating against blacks. *Compare United States v. Chesterfield City. School Dist.*, 484 F.2d 70 (4th Cir. 1973).

5. The plaintiff has presented some evidence that the Sheriff's Department has hired a disproportionately low number of blacks, that blacks are underrepresented in preferred and prestigious positions and that more rigorous standards are applied in selecting black employees than whites. This evidence has been denied. However, regardless of whose version of these facts the Court accepts, there is simply no evidence to support the contention that plaintiff's discharge was because of her race. Even if the plaintiff has demonstrated a pattern of racial discrimination or statistical evidence of past discriminatory employment practices, there is no evidence that General Order 71-2 has been used in the past or was used in this case to discharge plaintiff because she was black, rather the evidence is to the contrary. *See Cannady v. Person Cty. Bd. of Educ.*, 375 F.Supp. 689, 696-97 (M.D.N.C. 1974).

6. The Court concludes that in light of the ostensibly neutral standard by which the plaintiff was judged (General Order 71-2), the evidence that this standard has been applied in a manner which has *not* been discriminatory toward blacks, the fact that plaintiff was replaced by a black and the fact that a black, Deputy Knight, was the main investigating officer in plaintiff's case, plaintiff's discharge was not racially motivated and no violation of Title VII of the 1964 Civil Rights Act is found.

7. The Court finds that plaintiff was not afforded adequate notice or an opportunity for a hearing prior to discharge in violation of plaintiff's due process rights and her rights under 42 U.S.C. § 1983.

RELIEF

1. There is no need for a ruling on plaintiff's right to reinstatement since she no longer seeks that remedy. Therefore, it is unnecessary for the Court to decide whether her discharge pursuant to General Order 71-2 was proper. *See Horton*, 464 F.2d at 537.

2. Plaintiff is entitled to an award of back pay as female juvenile officer in the amount of $4,092.00. This award requires the Court to set forth certain subsidiary findings and computations supporting the award in compliance with *O'Neal v. Gresham*, Civil No. 74-2030, 74-2031 (4th Cir., decided July 8, 1975).

a. The parties agree and the Court finds that plaintiff, following her discharge, commenced making diligent and good faith efforts to secure new employment.

b. Plaintiff at all times prior to December 31, 1973, made a reasonable effort to mitigate her damages by holding down one, and for a few months, two jobs, while working toward completing her masters degree at North Carolina A & T State University.

c. While there is evidence that plaintiff attended summer school in 1973 when she might have been employed, the Court cannot say that this was a violation of her duty to mitigate damages. The summer courses were directed toward securing her master's degree. Moreover, she qualified for unemployment compensation for those six weeks of summer school, a fact which is further evidence that she was not avoiding employment. The unemployment compensation received for those six weeks will be deducted from the back pay award. *Diaz v. Pan American World Airways, Inc.*, 346 F.Supp. 1301, 1309 (S.D.Fla. 1972).

d. There is no evidence that the plaintiff was ever offered employment which she declined to accept. However, there is evidence that during the period January 1, 1974, to May 1, 1974, she continued to actively pursue studies leading to completion of her work to secure a master's degree, which degree was awarded in May, 1974, while abandoning, in part, her efforts to maintain employment in a manner which would fully minimize her loss of salary by reason of her discharge.

e. Therefore, the Court cannot find and conclude that a diligent and good faith effort was made to fully mitigate her damages during this period and, therefore, concludes that for the period January 1, 1974, to May 1, 1974, no back pay should be awarded. *See Brito v. Zia Co.*, 478 F.2d 1200, 1204 (10th Cir. 1973); *Jurinko v. Edwin L. Weigand Co.*, 477 F.2d 1038, 1046 (3d. Cir. 1973).

f. On May 1, 1974, the plaintiff obtained employment at a salary of $11,076.00 per annum, substantially higher than she was paid by the defendant, and thus is not entitled to consideration for back pay after May 1, 1974.

3. All of plaintiff's earnings from the time of discharge in February, 1973, to December 31, 1973, will be deducted from the back pay award. *Jannetta v. Cole*, 493 F.2d 1334, 1338 (4th Cir. 1974).

4. The back pay award is arrived at by the following computations.

a. Feb. 9, 1973 (date of discharge to August 31, 1973:
6 months & 19 days at $573.00 per month
6 x $573.00 = $3438.00)
) = $3,827.00
19/28 x $573.00 = $389.00)
$3827.00 − $250.00 (unemployment compensation for 6 weeks in summer 1973) = $3577.00

b. Sept. 1, 1973, to Dec. 31, 1973 (4 months): $573.00 (monthly salary with defendant) x 4 = $2292.00
Subtract the following earnings:
(i) Sept. 1973 to Dec. 31, 1973 — employment at Sears, Roebuck & Co. at $225.00 per month — 4 x $225.00 = $900.00
(ii) Sept. 1973, to Dec. 31, 1973 — employment at A & T State University at $277.00 per month — 4 x $277.00 = $1108.00
Sum of (i) and (ii) = $900.00 + $1108.00 = $2008.00
$2292.00 (what she would have earned — back pay award) − $2008.00 (what she did earn) = $284.00 a. + b. = $3577.00 + $284.00 = $3861.00. Interest (at 6%) on $3861.00 = $231.66
TOTAL BACK PAY AWARD — $3861.00 + $231.66 = $4092.66

5. The plaintiff is denied her request for attorney's fees. Such denial is clearly required in this action. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y.*, 42 U.S.L.W. 4561 (decided May 12, 1975); *accord O'Neal v. Gresham, supra*, at 7.

Accordingly, a judgment will be entered.

s/ Eugene A. Gordon

United States District Judge

August 15, 1975

A True Copy
Teste:
Carmon J. Stuart, Clerk
By: _____
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Voulynne Small,

Appellee,

versus

Paul H. Gibson, Sheriff
of Guilford County,

Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Eugene A. Gordon, District Judge.

Argued March 29, 1976 Decided Sept. 17, 1976

Before HAYNESWORTH, Chief Judge,
WINTER and BUTZNER, Circuit Judges

Perry C. Henson (Ronald G. Baker, Henson, Donahue & Elrod, W. B. Trevorrow, County Attorney, William L. Daisy, Assistant County Attorney, Guilford County Attorney's Office on brief) for Appellant; Norman B. Smith (Smith, Patterson, Follin, Curtis & James on brief) for Appellee.

PER CURIAM:

Voulynne Small, a black female deputy sheriff trainee, was discharged by the Sheriff of Guilford County for intoxication and immoral conduct. The Sheriff told the Chief of Police of New Bern, North Carolina, that Small had engaged in immoral behavior with two men. Whenever anyone asked him why he fired Small, he responded that he did it "on account of drinking and on account of being in a motel room with men." Although termination under these circumstances obviously foreclosed certain employment opportunities, she was provided no notice of the reasons for discharge and was given no opportunity for a hearing in which she could attempt to refute the charges. She was deprived of due process by not receiving that to which she was entitled — notice and a hearing. Therefore, the district court awarded her damages.

The Sheriff appeals from the judgment. We find his appeal to be without merit. The Supreme Court recently said in *Bishop v. Wood*, 44 U.S.L.W. 4820 (U. S. June 10, 1976), that no liberty interest was infringed and no hearing required when the reasons for discharge of a state employee were not made public, even if those reasons were false and even if they would stigmatize him. The Court reasoned that if the reasons were not made public, no stigma could result, no matter how serious or how false the grounds for discharge. This case is different; here, the Sheriff publicized his reasons.

We affirm the judgment of the district court.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Voulynne Small,

Appellee,

versus

Paul H. Gibson, Sheriff
of Guilford County,

Appellant.

ORDER

Upon consideration of the petition for rehearing, no request for a poll of the court being made on the suggestion for rehearing *en banc*, and with the concurrence of Judge Winter and Judge Butzner,

IT IS ORDERED that the petition be, and the same is hereby, denied.

s/ Clement Haynsworth, Jr.

Chief Judge, Fourth Circuit

October 21, 1976